

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BANCO do BRASIL,
Plaintiff

vs.

Case No. 1:09-cv-11343-NMG

275 WASHINGTON STREET TRUST,
Defendant

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JUDITH G. DEIN
AT BOSTON, MASSACHUSETTS
ON NOVEMBER 17, 2011

APPEARANCES:

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P R O C E E D I N G S

3 THE CLERK: The United States District Court for the
4 District of Massachusetts is now in session, November 17th, the
5 year 2011, in the matter of Banco versus 275 Washington Street,
6 Civil Action No. 2009-11343.

7 Could counsel please identify themselves for the
8 record.

9 MR. BERRY: Charles Berry, Arnold & Porter, pro hac
10 vice for the plaintiff, Banco do Brasil.

11 MR. WHITE: Good morning, your Honor. My name is Paul
12 White from Sugarman Rogers on behalf of the landlord in this
13 matter, 275 Realty Trust.

14 THE COURT: Okay. Well, we're here on plaintiff's
15 motion to compel, so I'll hear you.

16 MR. BERRY: Thank you, your Honor.

17 This motion to compel seeks the disclosure of some 24
18 documents that were identified on the landlord's privilege log.
19 They are identified as having been shared outside of the
20 attorney-client relationship with Emily Ou, who is an agent at
21 Cushman & Wakefield, the real estate brokerage firm. We also
22 seek permission to proceed with discovery from Cushman &
23 Wakefield, which we had served subpoenas on.

24 We served our document request on March 31st. The
25 privilege log was not received, however, until September 15th,

1 which was just one month before the end of discovery in this
2 action. We promptly sent a letter to the landlord counsel
3 demanding production of the documents.

4 The grounds for the motion are simple and clear. No
5 attorney-client privilege can attach to communications that the
6 landlord's lawyer had with somebody outside of the
7 attorney-client relationship, and Ms. Ou and Cushman &
8 Wakefield are indisputably not employees of the landlord or
9 clients of Attorney Hammer.

10 The landlord concedes the general rule that disclosure
11 to unrelated third-parties generally destroys the
12 attorney-client privilege. That's on Page 5 of their opposing
13 memorandum. As the party resisting discovery, the landlord has
14 the burden of showing that any document or information is
15 privileged. Judge Gorton's ruling in Tyler against Suffolk
16 County makes that very plain. And, as I said, Ms. Ou is not an
17 employee of the landlord and there is no showing that she was
18 necessary for the communication or transmission of legal
19 advice.

20 Significantly, there's no affidavit submitted by her,
21 nor is there any copy of the retainer agreement of Cushman &
22 Wakefield, the document that we had specifically requested.
23 She's simply a real estate agent. She was not hired to
24 facilitate the communication of legal advice, she was hired to
25 try to find a tenant for the commercial space that is owned by

1 the landlord.

2 THE COURT: And is she someone that participated with
3 the arrangement with the bank?

4 I mean --

5 MR. BERRY: I think she was involved early on in the
6 negotiations leading up to the lease, as far as I can tell.
7 The great volume of the documents that we're looking for --
8 there are 24, they're identified on the privilege log -- I
9 think all but three or four of them are for the period after
10 the lease was entered into, and significantly most of those,
11 almost all of them, are identified as being privileged relating
12 to legal advice concerning regulatory approval.

13 As Your Honor knows, the primary issue that we are
14 dealing with at this point is whether the bank was diligent in
15 pursuing its efforts to obtain regulatory approval from various
16 bank regulatory authorities. There isn't the slightest
17 suggestion that Ms. Ou had any knowledge whatsoever with
18 respect to bank regulatory approval, or that her involvement in
19 attorney-client communications was somehow necessary for the
20 rendering of advice on that subject.

21 So particularly with respect to that subject, but also
22 with respect to any other e-mails. There's no indication that
23 her involvement facilitated and was highly necessary for the
24 communication of --

25 THE COURT: Let me just say, sir, I didn't go through

1 the whole list, and it really is only 24, I guess.

2 MR. BERRY: Yes.

3 THE COURT: But are they all copied to the client as
4 well, or are there any direct communications?

5 MR. BERRY: I think in every instance they are
6 communications directly between the client and the attorney,
7 with a cc to Emily Ou. There's one, I believe, where Emily Ou
8 is indicated as the author of the e-mail, but --

9 (There was a break in the audio.)

10 MR. BERRY: -- one of the points that's made in the
11 opposing memorandum and affidavit of Attorney Hammer is that he
12 felt it necessary for Emily Ou to receive his legal advice.
13 Well, that's not the purpose of -- you know, the receipt of
14 legal advice is not something that would permit an agent to be
15 a necessary conduit or facilitator rendering legal advice, and
16 so for that additional reason there is absolutely no basis,
17 particularly under the reasoning of the Cavallaro decision of
18 the First Circuit for the assertion of privilege here, and we
19 ask that our motion to compel be granted.

20 Thank you.

21 THE COURT: Mr. White?

22 MR. WHITE: Thank you, your Honor.

23 To begin, I think you hit the nail right on the head.
24 When you ask the question whether or not these were direct
25 communications with Ms. Ou or whether she was merely copied on

1 those communications, Mr. Berry is quite right that in every
2 instance there may perhaps be that one exception that he
3 mentioned.

4 She is copied on those communications. In other
5 words, there is absolutely no doubt in this case that these
6 were communications that were it not for this issue, were it
7 not for the fact that she was cc'ed on these communications,
8 they're clearly attorney-client privileged communications, they
9 were clearly intended to be communications between the attorney
10 and the client, and they go to the heart of the issues in this
11 case.

12 THE COURT: Well, what's missing from your papers is
13 any indication that Ms. Ou -- is that how you pronounce it --
14 "Ou" knew that she was supposed to keep them confidential, that
15 she's somehow involved in that this was a communication that
16 was intended to be kept confidential.

17 MR. WHITE: That's provided by Mr. Hammer, your Honor,
18 by the attorney, and it seems to me he is the appropriate
19 person to indicate based on the test that is in place, which is
20 whether or not her involvement was required for the
21 rendering --

22 THE COURT: You've given us a very, very general
23 affidavit here. I don't know what to do with it.

24 MR. WHITE: With all due respect, your Honor, given
25 the nature of a privilege, which is that Mr. Hammer is

1 describing why her involvement was important to the activities
2 that he was engaged in without revealing what the particular
3 communications were, it is of necessity a general conclusory
4 affidavit, but it provides exactly the -- and meets exactly the
5 standard, I submit, that is applicable here, which is that he
6 doesn't merely say that her involvement was useful to him, he
7 says it was essential to him; that she was integral in what he
8 was doing, and that's not surprising. She was the person, the
9 agent -- undisputed that she is the agent of the landlord, of
10 the trust, who has had the direct involvement and interfaced on
11 behalf of the trust with the bank with respect to all of the
12 matters that are at issue in this case.

13 She is, in essence, the point person for the trust in
14 connection with this matter, and as to all of those matters,
15 and he describes what the three different types of matters were
16 as to which he communicated with his client, the initial
17 execution of the lease, post-execution matters, and then
18 ultimately obtaining information from her to facilitate him
19 providing legal advice to the client concerning what was
20 becoming the matter of greatest concern, whether or not the
21 bank was obtaining regulatory approval in an appropriate way,
22 and all of that is set out appropriately in his affidavit.

23 If for some reason you believe, the Court believes,
24 that I have overlooked obtaining an affidavit from her to
25 indicate that she understood that the communications were

1 confidential communications, I would ask Your Honor that I be
2 provided with an opportunity to obtain that affidavit and to
3 submit it to the Court, because certainly it is my
4 understanding that all of those requirements are met in this
5 instance.

6 (There was a break in the audio.)

7 MR. BERRY: If I may, just a couple of words by way of
8 rebuttal.

9 Mr. White indicated that Ms. Ou was the point person
10 for communications with the bank. In fact, there's nothing in
11 the record to suggest that, but there was testimony by Craig
12 Harwood, one of the principles of the landlord, on the very day
13 that we filed our reply papers, and so we put a footnote on
14 Page 2 of our reply memo where he used those very words and
15 said that he was the point person for leasing of the subject
16 property.

17 He also stated in response to a direct question -- and
18 I'm sorry we don't yet have the transcript, but we'd be happy
19 to provide that -- that Ms. Ou, his rental agent, did not
20 assist the landlord with respect to the regulatory approval
21 process. The subject matter of these e-mails, all but a small
22 number of them, is said to be legal advice concerning
23 regulatory approval, and their own principal, Craig Harwood,
24 has stated under oath that she was not involved in the
25 regulatory approval process.

1 So I think the record that we have is very clear, that
2 she is not an agent of a type who was retained for the express
3 purpose of facilitating attorney-client communication, and I
4 would just again direct the Court's attention to the First
5 Circuit's 2002 decision in Cavallaro where that case involved
6 an accounting firm, Ernst & Young, and among other things the
7 court pointed out in ruling that communications with Ernst &
8 Young were not privileged, that Ernst & Young was not employed
9 for this purpose, that is for the purpose of facilitating
10 attorney-client communications.

11 So I think it's very clear on the record as it stands
12 that there is no privilege here, and I would request that the
13 Court rule if Mr. White had sought to get an affidavit of
14 Ms. Ou at some earlier date, he could have done it. He has not
15 done so and I don't, respectfully, believe that he should be
16 given that opportunity. We served our request back in March.
17 The responses were due soon after that. We gave him an
18 extension of time, but they waited until September 15th to give
19 us a privilege log indicating that they had withheld these
20 things.

21 The Court's deadline for completion of discovery was
22 October 15th, and one of the requests in our motion is that we
23 be permitted to have this very small remaining discovery, you
24 know, as soon as possible, but after the October 15th date.

25 THE COURT: This is my concern right now. I have an

1 inkling -- I don't think that I have enough facts. I don't
2 think that they gave me enough information. But I have a
3 concern that it would be privileged otherwise, you know, and
4 I'm going here on a burden of proof kind of thing. That makes
5 me a little uncomfortable, frankly, to waive an attorney-client
6 privilege.

7 So I would like to review these documents in-camera.

8 Is there any reason that I can't do that?

9 MR. BERRY: No, your Honor. I actually have some
10 authority on your ability to do that and we would certainly
11 welcome it. We rather suspect that these documents aren't
12 privileged at all, but that's another story.

13 THE COURT: There's only 24. Usually I get this when
14 there are 4,000. I'm like so excited that there's only 24
15 that --

16 MR. WHITE: Yes, I've had those cases too, your Honor.

17 The only concern that I have about that really stems
18 from my own recent experiences (inaudible) where the rule is
19 very clear that in-camera inspection is frowned upon simply
20 because it does destroy the attorney-client privilege. But in
21 the circumstances here -- and I suppose this is the concern I
22 have there, is that I don't think that there is an issue that
23 the documents are privileged, other than the fact that she is
24 copied on the documents. So --

25 THE COURT: Well, I have to tell you, I do not think

1 that you have established sufficient facts to establish her
2 role, so you have a choice. Either I'll look at them in-camera
3 or you have a week to provide an affidavit, and we'll stand on
4 that from her. And if it's insufficient, it's insufficient.

5 MR. WHITE: Your Honor, that is to provide an
6 affidavit from Ms. Ou that she understood that these were
7 confidential communications?

8 THE COURT: No. Whatever her role was --

9 MR. WHITE: Yes.

10 THE COURT: -- let her define her role and let her
11 define her understanding that she was -- whether there was an
12 understanding that these communications were intended to be
13 kept confidential.

14 MR. WHITE: Yes. And that's obviously --

15 (There was a break in the audio.)

16 MR. WHITE: -- (inaudible), your Honor.

17 May I give consideration to, and I want to consult
18 with the client obviously about that, may I do both of those
19 things?

20 In other words, I can provide you with the document,
21 but it seems to me that one of the things the Court is also
22 concerned about is that she understood that these were
23 confidential communications.

24 THE COURT: Yes, with the understanding that you are
25 legitimately annoyed that this was not done before.

1 MR. BERRY: Well, it's not just that, your Honor,
2 there's more to the showing than her understanding that these
3 communications are confidential. There has to be a showing
4 that she was retained for the purpose of facilitating
5 attorney-client communications, and in this instance,
6 specifically on the subject of bank regulatory approval.

7 THE COURT: Well, this is -- my order is that she has
8 until the Monday after Thanksgiving to provide an affidavit
9 that describes her role, what she was hired to do and how she
10 treated this affidavit. I mean, I don't want to -- I'm not
11 dictating it to you. You provide the information that you
12 think is important. We're going to rise and fall on that,
13 okay.

14 MR. WHITE: I understand, your Honor.

15 THE COURT: And then you can decide whether or not you
16 want to submit them in-camera --

17 MR. WHITE: Yes.

18 THE COURT: -- and I'll factor that in as well.

19 MR. WHITE: Thank you, your Honor.

20 MR. BERRY: If I may, your Honor, one additional
21 point. If there is to be a submission by Ms. Ou, I would
22 request that the landlord be required to produce the retainer
23 agreement for Cushman & Wakefield. There was testimony at
24 Mr. Craig Harwood's deposition that there was a long-standing
25 retainer agreement going back some years, and then, as I

1 understood it, a more specific engagement with respect to the
2 lease to the bank; and I think that that is an important
3 factor, and frankly their failure to produce that, I think, is
4 a strong and telling indication that they recognize that she
5 was not retained for the purpose of assisting in
6 attorney-client communications.

7 THE COURT: How is that privileged?

8 MR. BERRY: It's not privileged.

9 THE COURT: How is that document privileged?

10 MR. WHITE: I don't believe that's what the objection
11 was. I believe the objection was that there is a highly
12 limited scope of discovery under the Court's order that was to
13 take place now and that wasn't within it.

14 THE COURT: All right. You need to produce it, okay.
15 You need to produce it with her affidavit. And I will give you
16 a week. I don't want to delay this much. You have an
17 extension on the discovery for this. But if you want a week to
18 file a supplemental memo after she files her affidavit, if you
19 feel that it's insufficient, you can do that.

20 MR. BERRY: I appreciate that, yes.

21 THE COURT: Okay. So when you file her affidavit, you
22 need to give me whatever you want to give me, all right.

23 MR. WHITE: Yes.

24 THE COURT: And then you can file the response and
25 I'll deal with it on the papers, whatever those papers might

1 be, okay.

2 MR. WHITE: Fine.

3 THE COURT: But you need to produce the engagement
4 contract.

5 MR. WHITE: Yes, your Honor.

6 MR. BERRY: There is one other scheduling issue, which
7 is that the Court's deadline for submitting dispositive motions
8 is December 15th. It's coming up pretty soon. We were
9 prepared to --

10 THE COURT: Can I ask you, is this schedule still
11 before me, do you know, or are you on Judge Gorton's list?

12 MR. BERRY: I think that was Judge Gorton. It's
13 actually an exhibit to our papers here.

14 THE COURT: I think that it was only referred to me
15 for this motion.

16 MR. BERRY: Yes, I think that's right.

17 THE COURT: So I will enter an order that discovery is
18 extended to cover this, but you're going to need him to extend
19 the summary judgment date.

20 MR. BERRY: Okay. I'm not eager to extend it long,
21 but this is a point that would be relevant.

22 THE COURT: We will have this decided, you know, the
23 first week in December. As soon as you submit your things, I
24 promise you we'll deal with it.

25 MR. BERRY: Fine. Very good.

1 THE COURT: Okay. But I can't extend his date.

2 MR. BERRY: I understand.

3 THE COURT: Okay. Anything else?

4 MR. WHITE: Your Honor, the date for the submission of
5 this is the Monday after Thanksgiving by me?

6 THE COURT: Yes.

7 MR. WHITE: Thank you.

8 THE COURT: And that's anything that you're going to
9 do.

10 MR. WHITE: Yes.

11 THE COURT: And do you want to respond by Friday, I
12 mean, we can do it shorter?

13 MR. BERRY: We'll try to do it. I just assume have
14 until Monday, but --

15 THE COURT: All right. Whenever you do it. If not,
16 you have until the Monday after that. I don't have the dates
17 in my head here.

18 MR. BERRY: All right. I think it's the --

19 THE COURT: So we're dealing with the 28th and the
20 5th.

21 MR. BERRY: And the 5th. That's good, yeah.

22 THE COURT: Okay.

23 (Pause.)

24 THE COURT: Okay. Thank you.

25 MR. BERRY: Thank you, your Honor.

1 MR. WHITE: Thank you.

2

3 (The hearing was concluded.)

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C E R T I F I C A T I O N

I, Karen M. Aveyard, Approved Federal Court Transcriber, do hereby certify that the foregoing transcript, consisting of 16 pages, is a correct transcript prepared to the best of my skill, knowledge and ability from the official digital sound recording of the proceedings in the above-entitled matter.

/s/ Karen M. Aveyard

Karen M. Aveyard

November 18, 2011

Date